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No. 97-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

THE STATE OF NEW HAMPSHIRE
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October 24, 1997

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RE-STATED QUESTION PRESENTED

Whether a condition of probation, authorizing a probation officer to conduct a warrantless search of the probationer's residence that is reasonably related to the supervision and rehabilitation of the probationer, violates the Fourth Amendment guarantee against unreasonable searches where there is no requirement of individualized suspicion.

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OPINION BELOW

The opinion of the New Hampshire Supreme Court affirming the petitioner's conviction is reported at 142 N.H. ____, 696 A.2d 530 (1997).

JURISDICTION

Judgment of the New Hampshire Supreme Court was entered on May 22, 1997. The petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. §1257(a). However, as discussed in detail *infra*, the respondent asserts that the Court is without jurisdiction to address the issue presented.

STATEMENT OF THE CASE

The petitioner, a New Hampshire corporation, was charged with the offenses of prostitution and prohibited sale of alco-

hol. A jury found the petitioner guilty as charged and the New Hampshire Supreme Court affirmed the verdicts in an opinion dated May 22, 1997. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 1-28.

The relevant facts as found by the New Hampshire Supreme Court are fully set forth in the opinion from which the petitioner appeals to this court. A review of those facts reveals that on February 21, 1994, the petitioner, a fraternity at the University of New Hampshire in Durham, New Hampshire, held a "rush" at its fraternity house to attract new members. To encourage people to attend, the petitioner hired two female strippers to perform at the event. Fraternity brothers encouraged the guests to pay the strippers, and suggested that the extent and nature of the women's entertainment would depend upon the amount of money they received. Over the course of the evening, a number of guests performed oral sex on one of the strippers in exchange for money. Pet. App. at 2.

During the party, one of the guests, nineteen year-old Andrew Strachan, learned that beer was available from a soda machine at the fraternity house. He found the machine, waited in line with three or four other people, and eventually purchased three to five cans of beer. The machine and its proceeds were under the petitioner's control. Pet. App. at 2-3.

Following its conviction, the petitioner was sentenced, *inter alia*, to two years probation for the felony offense of illegal sale of alcohol. The terms of probation included the following condition:

> The [petitioner] shall not allow the consumption on its premises of alcoholic beverages, and the [petitioner's] premises shall be subject to unannounced searches by the Department of Corrections

> or the Durham Police Department to determine compliance with . . . any condition of probation. A violation found by the Durham Police Department shall be brought to the attention of the Department of Corrections.

Pet. App. at 13.

The petitioner appealed the sentence to the New Hampshire Supreme Court, challenging the constitutionality of the above-quoted condition under the state and federal constitutions. The petitioner asserted, *inter alia*, that the condition impermissibly authorized unannounced, warrantless searches by probation officers and the Durham Police Department. At oral argument before the state court, the State conceded that to the extent the probation condition allowed the Durham police independently to search the petitioner's corporate premises, the condition was invalid. Pet. App. at 20. The New Hampshire Supreme Court held that, "when a condition of probation authorizes random warrantless searches and the condition is reasonably related to the supervision and rehabilitation of the probationer, a warrantless probation search is constitutionally permissible." Pet. App. at 17. However, because the sentencing order did not mandate that the probation officer's search be conducted in a reasonable manner, as defined in the opinion, the court vacated the sentence and remanded the case to the trial court for resentencing not inconsistent with its opinion. Pet. App. at 21.

On September 9, 1997, the sentencing order was amended in accordance with the dictates of the New Hampshire Supreme Court. Appendix to Brief in Opposition ("Appendix") at 1a. In the interim, on November 10, 1996, the petitioner's probation expired under the express terms of the sentence. Appendix at 1a.

ARGUMENT

I. THE COURT IS WITHOUT JURISDICTION TO CONSIDER THE ISSUE PRESENTED

A. The Case Is Moot

Article III of the Constitution restricts the jurisdiction of this Court to the "adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199, 98 L. Ed. 2d 529, 108 S. Ct. 523 (1988). Jurisdiction does not lie simply because a live controversy existed at the time the case was decided by the lower court. *Burke v. Barnes*, 479 U.S. 361, 363, 93 L. Ed. 2d 732, 107 S. Ct. 734 (1987). The dispute must be presently existing when the case is considered by this Court.

The issue raised by the appellant concerns the application of a condition of probation imposed upon it on November 10, 1994. By the express terms of the sentencing order, the probationary term expired on November 10, 1996, two years after its imposition. Appendix at 2a. The appellant is no longer subject to the challenged probationary term. Accordingly, the issue of the constitutionality of that term, as applied to the appellant, is moot. *See Burke v. Barnes*, 479 U.S. at 364, 93 L. Ed. 2d 732, 107 S. Ct. 734 (1987) (issue of whether legislative bill became law was moot where bill expired by its own terms).

This is not a situation where potential collateral consequences render what would otherwise be a moot issue live. *Compare Minnesota v. Dickerson*, 508 U.S. 366, 371, n. 2, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993) (live controversy remains, despite statute providing that finding of guilt not deemed a conviction for purposes of legal disqualifications arising from criminal convictions, where record of guilty finding could be reinstated and used against respondent in fu-

ture criminal proceedings); *Sibron v. New York*, 392 U.S. 40, 55, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968) (criminal matter did not become moot upon satisfaction of sentence; possibility of adverse collateral legal consequences was sufficient to create justiciable controversy); *Carafas v. Lavallee*, 391 U.S. 234, 237, 20 L. Ed. 2d 554, 88 S. Ct. 1556 (1968) (although petitioner had fully satisfied his criminal sentence, challenge to legality of sentence was not moot; the collateral consequences flowing from conviction gave petitioner a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.") (quoting *Fiswick v. United States*, 329 U.S. 211, 222, 91 L. Ed. 196, 203, 67 S.Ct. 224) (1946)). The appellant is not challenging the legality of his underlying conviction or the imposition of probation. It is simply disputing the constitutionality of one specific, and now expired, condition of probation. Unlike a criminal conviction, there are no "disabilities or burdens" that may flow from the probationary condition. Thus, the appellant has no ongoing stake in a determination of the condition's constitutionality. *See Naylor v. Sup. Ct. of State of Ariz., Etc.*, 558 F.2d 1363 (1977) (petitioner's habeas challenge to legality of underlying misdemeanor conviction was moot where imposed term of 90 days probation had expired and no adverse collateral consequences from the conviction remained), *cert. denied*, 435 U.S. 946, 55 L. Ed. 2d 544, 98 S.Ct. 1530 (1978).

Further, the issue the appellant seeks to litigate is not one that will likely escape appellate review if raised in future cases. *See Sosna v. Iowa*, 419 U.S. 393, 399-401, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975) (although named plaintiff was no longer being harmed by enforcement of one-year residency requirement, class action suit challenging constitutionality of the requirement was not moot where issue was likely to arise in future but escape appellate review because of requirement's time-limited applicability). Issues such as the one presented here frequently arise in the context of an appeal from a decision granting or denying a motion to sup-

press evidence gained as a result of an allegedly illegal search. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 124 L.Ed. 2d 334, 113 S. Ct. 2130 (1993) (whether seizure of lump of cocaine from defendant's pocket, detected during frisk search, violated Fourth Amendment where officer had to conduct further search to determine that lump was contraband); *Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990) (whether warrantless seizure of weapons from defendant's home was prohibited by Fourth Amendment where weapons were in plain view but discovery was not inadvertent); *Scott v. Pennsylvania Bd. of Probation & Parole*, 698 A.2d 32 (Pa.1997) (warrantless search of parolee's residence by parole officer found to violate Fourth Amendment, notwithstanding parolee's signing of parole agreement authorizing warrantless search of residence, where search not based on reasonable suspicion; evidence seized as a result held not admissible at parole revocation hearing) *cert. petition filed*, (U.S. Sept. 30, 1997) (No. 97-581). As noted above, such challenges typically do not become moot with the passage of time due to the potential adverse collateral consequences of a criminal conviction. *See e.g. Minnesota v. Dickerson*, 508 U.S. at 371, n. 2.

B. The Case Does Not Present An Actual Controversy

The Article III case-or-controversy restriction makes the existence of a genuine controversy essential to the exercise of this Court's jurisdiction. *Asarco Inc. v. Kadish*, 490 U.S. 605, 619, 104 L. Ed. 696, 109 S. Ct. 2037 (1989). At a minimum, it requires that the party invoking the Court's authority demonstrate that there is "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United F. & C. Workers v. Brown Group*, 134 L. Ed. 2d 758, 766, 116 S. Ct. 1529 (1996). *See also Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70, 78 L. Ed.

2d 58, 104 S. Ct. 373 (1983) ("To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision."). No justiciable dispute is presented where a litigant is seeking an advisory opinion based on a hypothetical situation. *Flast v. Cohen*, 392 U.S. 83, 95, 20 L. Ed. 2d 947, 88 S.Ct. 1942 (1968). *See also North Carolina v. Rice*, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 92 S.Ct. 402 (1971) (case must present "real and substantial controversy admitting of specific relief . . . , as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 81 L. Ed. 2d 617, 57 S. Ct. 461 (1937)).

The instant petition for certiorari presents no genuine, justiciable controversy. The appellant does not assert that it has suffered any injury as a result of the challenged condition of probation. Indeed, the petition is silent with respect to whether the condition was actually enforced and under what circumstances. The appellant is simply asking this Court to advise the parties, without reference to the facts of a particular search, whether the probationary condition at issue is violative of the fourth amendment guarantee against unreasonable searches. *Compare Laird v. Tatum*, 408 U.S. 1, 11-14, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972) (declaratory judgment action seeking declaration that litigant's First Amendment rights were being impermissibly chilled by certain governmental surveillance activities did not present justiciable controversy where there was no claim of actual injury; "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.") *with Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) (Court considered action seeking declaratory and injunctive relief against enforcement of school policy requiring all students participating in interscholastic activities to submit to random drug testing where litigant had been pro-

hibited from engaging in activities because parents refused to sign testing consent form). The Constitution does not permit the issuance of such advisory opinions.

CONCLUSION

Although the petitioner is correct in its assertion that there is currently a split of authority on the issue of whether a probation search must be justified by individualized suspicion, this is not a case in which the Court should address the issue. Not only is the issue moot and no genuine controversy is presented, the facts of the case are relatively unique. The petitioner is a corporation and the issues surrounding the search of a corporate premises may differ from those involved in the search of an individual. Accordingly, a decision by this Court in this case may not have broad applicability.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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APPENDIX

APPENDIX 1a

THE STATE OF NEW HAMPSHIRE

Strafford County **Superior Court** **No. 94-S-197-F**

RETURN FROM SUPERIOR COURT SEP 16 '97

Name: Zeta Chi Fraternity, Assoc., UNH, 17 Madbury Rd., Durham NH DOB: n/a

■ Indictment ☐ Waiver ☐ Information ☐ Complaint

Offense: Prohibited Sales RSA: 175:6 Date: 02/21/94

Disposition: Guilty By ☐ Plea ■ Jury ☐ Court on 10/7/94 T/N: n/a

Sentence: 11/10/94: A finding of Guilty is entered. Def. Zeta Chi is sentenced as follows: Def. is fined $50,000.00 Plus statutory penalty assessment. All of the fine & penalty Assessment are suspended on the following cond.'s: Between 12/1/94 & 6/1/96, members of the def. corporation perform 2500 hrs. of community service under the direction of the Dept.of Cor.'s, Div. of Field Services in Strafford Cty. on such projects & such time schedules as the Dept. of Cor.'s deems appropriate; & def. shall not allow the consumption of alcoholic beverages on its premises in Durham, NH for a prd. of 2 yrs. Fine & penalty assessment may be brought forward only w/in 3 yrs. of this date. Def. is placed on prob. for 2 yrs., on such terms as to supervision as the Dept. of Cor.'s deems appropriate. RSA 651:2,V. As cond.'s of prob., the def. shall not allow the consumption of alcoholic beverages on its premises in Durham, NH, & the def.'s premises shall be subject to unannounced searches by the Dept. of Cor.'s, or the Durham Police Department, to determine compliance w/paragraph 2 of the cond. of suspension & any cond. of prob. Any Viol. found by the Durham Police Dept. shall be brought to the attention of the Dept. of Cor.'s. Superior Court Rule 107 (h). Def., through its officers shall meet w/the Div. of Field Serv. w/in 10 days to implement the terms & cond. of this order. Viol. of the terms & cond. of prob. may result in the revocation of prob. & the imposition of any sent. w/in the limit prescribed by law for this offense. This sent. is consecutive to the sent. in 94-S-199-F. So Ordered. (MOHL PJ)

9/9/97: Agreement amending the sentence: In accordance w/the NH Supreme Crt. decision of 5/22/97, the cond.'s of prob. portion of the sent. in the above matter may be amended by deleting from the 11th line of said sentence the words, "or the Durham Police Dept." & by deleting the sentence, "any viol. found by the Durham Police Dept. shall be brought to the attention of the Dept. of Cor.'s" which begins at line 12 of said sentence. This agreement is entered into in order to bring the sent. in this matter into compliance w/the aforesaid NH Sup. Crt. decision & is not intended any waiver of the def.'s rights to file an Appeal of the aforesaid NH Supreme Crt. decision w/the Supreme Crt. of the US as to whether or not a cond. of prob. which provides that a prob. officer can conduct searches w/no individualized suspicion violates the 4th amendment's guarantee against unreasonable searches, or as to any other questions & issues in this matter which may be accepted by the Sup. Crt. of the US for determination. SO ORDERED (MOHL PJ)

11/10/94 BRUCE F. MOHL Julie W. Howard
Date Presiding Justice Clerk

cc: ■ State Police ☐ Division of Motor Vehicle ■ Department of Corrections
☐ Defendant ■ Prosecuting Attorney ☐ Office of Cost Containment
☐ Sheriff ☐ GAL ☐ District Court
■ Defense Counsel ☐ Sentence Review Board
(J. P. NADEAU, ESQ.)

■ Durham Police Dept.

DISPOSITION/MITTIMUS